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No. 90-234

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CITY OF SEAFORD, DELAWARE,
Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF IN OPPOSITION AND APPENDIX

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 24.2, respondent Delmarva Power & Light Company ("Delmarva") restates the questions presented which are inaccurately stated in the petition of the City of Seaford, Delaware ("Seaford") for a writ of certiorari (P i).[1]

1. Is the order of the Delaware Supreme Court, reinstating Delmarva's claim which had been dismissed on summary judgment and remanding the case for trial of the issue of just compensation, an interlocutory order rather than a "final" judgment within the meaning of 28 U.S.C. § 1257(a)?

2. Pursuant to Delaware statutes, as implemented by Sussex County, Delaware ordinances, does Delmarva enjoy a proprietary franchise right to distribute electricity to retail customers in the County?

3. If Seaford takes over Delmarva's property right to distribute electricity to certain customers, is Seaford required to pay just compensation by the United States Constitution (Amendments V and XIV) and independently by the Delaware Constitution of 1897 (Article I, §§ 7 and 8)?

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1. Throughout this brief in opposition, pages in the petition for a writ of certiorari and petitioner's appendix are cited as "P—," or "P—a." Delmarva's appendix attached hereto is cited as "—b."

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RULE 29.1 LISTING OF PARENT COMPANIES AND SUBSIDIARIES

Delmarva Power & Light Company is publicly held and does not have a parent corporation. All subsidiaries of Delmarva Power & Light Company are wholly owned by it.

CONSTITUTIONAL PROVISIONS, DELAWARE STATUTES AND SUSSEX COUNTY, DELAWARE ORDINANCES INVOLVED

The case raises a threshold jurisdictional issue of the absence of finality under 28 U.S.C. § 1257(a).

This case was brought under the just compensation and due process clauses of the United States Constitution, U.S. CONST. amend. V and amend. XIV, § 1, and under parallel but independent provisions of the Delaware Constitution of 1897, DEL. CONST. art. I, §§ 7 and 8.

The controversy in the Delaware Courts did not concern the interpretation of the federal or state constitutional provisions. Rather, the parties joined issue on the question whether Delmarva enjoys a franchise by virtue of (a) statutory enactments of the State of Delaware, as follows: 26 Del. C. §§ 102(1) and (2), 202(a), 203A(a), 203A(c)(i), 204, 906 and 907; and (b) Sussex County, Delaware franchise grants dated July 10, 1900 and July 22, 1930.

Pursuant to Supreme Court Rule 24.1(f), the text of each of the foregoing provisions is set forth in the Appendix attached to this Brief.

STATEMENT OF THE CASE

With one important exception, Delmarva accepts Seaford's statement of the case (P 3-5).

The Delaware Supreme Court did not "agree" that "Delmarva's franchise was nonexclusive," as asserted in the petition (P 4; *see also* P 2, 5, 6, 9 and 10). What the Delaware Supreme Court actually held was (1) that Delmarva's *initial* (1900 and 1930) franchise grants were "nonexclusive" (P 17a); (2) that Delmarva later became a "regulated monopoly" pursuant to a State policy to "protect the pioneer utility" from competition (P 14a-15a); and (3) that the *combination* of Delmarva's

initially nonexclusive franchise and later regulatory protection from competition "constitutes a property right as to customers served by Delmarva, which cannot be taken without due process" (P 18a; 28a).

Indeed, the Delaware Supreme Court found that outside Seaford, "Delmarva enjoys an exclusive right to serve . . ." (P 18a). Delmarva's franchise is "nonexclusive" as against Seaford only in the sense that as an unregulated governmental entity, Seaford has the power to serve new locations within its municipal boundaries and even to take over Delmarva customers located there. To take established customers, however, is an infringement of Delmarva's franchise for which Seaford must pay just compensation (P 18a, 28a). The just compensation payable by Seaford is yet to be determined in the Delaware trial court.

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to review the order of the Delaware Supreme Court because that order is not "final" within the meaning of 28 U.S.C. §1257(a). The case remains pending in the trial court where the just compensation payable by Seaford to Delmarva will be assessed.

2. The Court lacks jurisdiction to review the issue decided by the Delaware Supreme Court, which is whether, under Delaware law, Delmarva enjoys proprietary franchise rights to distribute electricity to Sussex County, Delaware customers. This Court has long recognized that such property law questions are a matter of state law, and Seaford conceded below that Delaware law controls the case at hand.

3. The holding of the Delaware Supreme Court that Seaford must pay just compensation for taking Delmarva's property is supported independently by the Delaware constitution, and in any event is correct as a matter of settled federal constitutional law.

ARGUMENT

I. THE JUDGMENT BELOW WAS NOT A "FINAL" JUDGMENT AND THEREFORE IT IS NOT REVIEWABLE BY WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1257(a)

The Court has jurisdiction to review, by writ of certiorari, only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . .," 28 U.S.C. §1257(a); *O'Dell v. Espinoza,* 456 U.S. 430 (1982).

In the opinion and order sought to be reviewed by the petition, the Delaware Supreme Court ruled that Seaford has taken Delmarva's property, and remanded the case for trial of the compensation payable by Seaford on a theory of inverse condemnation (P 18a, 27a-28a). This clearly was not a "final" decision within the meaning of 28 U.S.C. §1257(a):

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.,* 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 127, 65 S.Ct. 1480, 89 L.Ed. 2092 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores,*

Inc., 414 U.S. 156, 163, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973).

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 632 (1981); *see also Catlin v. United States,* 324 U.S. 229, 233-34 (1945) (federal and state condemnation rulings are not reviewable "in advance of determination of just compensation"); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 n.6 (1975) (same); *O'Dell v. Espinoza, supra,* 456 U.S. 430 (state supreme court decision remanding case for trial was not final).

There is thus no basis for Seaford's contention that the judgment below was final or its citation of *Cox Broadcasting* in support of that claim (P 9-10). Like the *San Diego Gas & Electric* case, *Cox Broadcasting* makes clear (1) that just compensation is a substantial federal issue and (2) that where as here the compensation issue is yet to be tried, the judgment below is not "final" as required by 28 U.S.C. §1257(a). 420 U.S. at 477 n.6.

II. THE COURT LACKS JURISDICTION TO REVIEW THE DECISION BELOW, WHICH CONSISTS OF DELAWARE LAW DETERMINATIONS BY THE DELAWARE SUPREME COURT

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). The Court is bound to accept the interpretation of a state's law by the highest court of the State, *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n,* 426 U.S. 482, 488 (1976). The Court has "no authority to review state determinations of purely state law," *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 387 (1986).

The decision below turned upon the state law determination that Delaware statutes and County ordinances confer a proprietary franchise upon Delmarva which

Seaford infringed when it appropriated two of Delmarva's customers (P 17a-18a, 28a). In other words, the controversy below was whether Delmarva enjoys a property right under Delaware law, not whether the federal and Delaware constitutions protect property rights that do exist under state law. Seaford's contention that the decision below "directly conflicts with a number of rulings of this Court and of the United States courts of appeals" (P 5) is wrong.[2] Even if there were a split of authority, the decision of the Delaware Supreme Court would be dispositive of the Delaware law issues here presented.[3]

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2. The federal authorities relied upon by Seaford hold that the owner of a non-exclusive franchise is not entitled to an injunction against the construction and operation of a competing plant by a governmental entity. *See Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118 (1939), *overruled Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Durham v. North Carolina,* 395 F.2d 58 (4th Cir. 1968); and the further citations at P 6-7, n.3.

In this case Delmarva does *not* seek to preclude Seaford from owning and operating its own electric system. It simply seeks to be compensated for the loss of two customers which it had the proprietary right to serve under Delaware law (pp. 1-2, *supra*).

3. The decision below does not rest upon some idiosyncratic " 'Delaware rule,' " as Seaford implies (P 9). While some variation in conceptualization is to be expected in matters controlled by state law, state courts from around the country recognize that state regulation confers a vested property right upon an established company – protecting it against all competition – whether termed an "exclusive franchise" or by some other name. Thus a previous decision of the Delaware Supreme Court described a regulated utility as "a legalized monopoly." *Diamond State Telephone Co. v. Public Service Commission,* 367 A.2d 644, 646 (Del. 1976); *accord, City of Tucson v. El Rio Water Co.,* 101 Ariz. 49, 415 P.2d 872, 875 (1966) (a regulatory certificate of convenience and necessity "creates a monopoly" whose value must be paid by a city in a condemnation action); *Sende Vista Water Co. v. City of Phoenix,* 127 Ariz. 42, 617 P.2d 1158, 1161 (Ct. App. 1980) (certificate constitutes property which city should acquire before providing service in certificated area); *Summers Appliance Co. v. George's Gas*

Seaford's contention that the decision below turned solely upon the federal constitution and not upon Delaware law (P 7) is belied by its own arguments to the Delaware courts that were framed entirely in terms of Delaware law (*see* Appendix points II and III at 11b – 17b). Seaford concluded its opening brief in the Delaware Superior Court as follows (13b):

> The only issue is the legal issue of whether DP&L has a valid or compensable franchise right to serve the properties in question. By the operation of applicable provisions of the Delaware Constitution and Delaware statutory law, and pursuant to case law precedent established in Delaware courts, it is clear

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NOTES *(Continued)*

Co., 244 Ark. 113, 424 S.W.2d 171, 173 (1968) (regulated utilities enjoy "exclusive privileges" including franchises and protection from competition); *Public Service Co. of Colorado v. Public Utilities Commission*, 765 P.2d 1015, 1021 (Colo. 1988) ("This exclusive right to serve an area is a property right which cannot be affected except by due process of law"); *City of Greeley v. Poudre Valley Rural Electric Ass'n, Inc.*, 744 P.2d 739, 745 (Colo. 1987) *appeal dismissed*, 485 U.S. 949 (1988) (same); *Cambridge Telephone Co. v. Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576, 579 (1985) (same); *Bear Creek Water Ass'n, Inc. v. Town of Madison*, 416 So.2d 399, 400 (Miss. 1982) ("the certificate of public convenience and necessity has value for which just compensation must be made. . . ."); *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So.2d 9, 11 (Miss. 1973) ("grandfather" certificate is "an exclusive right to operate in a designated area" and as such, a valuable franchise right which must be condemned and paid for by city wishing to take over service); *City of Jackson v. Creston Hills, Inc.*, 252 Miss. 564, 172 So.2d 215, 220 (1965) ("grandfather" certificate "is a valuable right, entitled to protection by the courts" against municipal competition); *Town of Culpeper v. Virginia Electric & Power Co.*, 215 Va. 189, 207 S.E.2d 864, 867-68 (1974) ("The weight of authority, and the principle with which we agree, is that a certificate of public convenience and necessity is a franchise and is a property right. As such it is entitled to the protection of the courts."); *Tri-County Electric Ass'n. Inc. City of Gillette*, 584 P.2d 995, 1001, n.9 (Wyo. 1978) (noting that certificate is a franchise).

> that DP&L has no valid franchise rights whatsoever to serve these properties. Having no exclusive franchise rights, and having claimed no other compensable interest in its Complaints in these proceedings, DP&L makes no claim for which it may be compensated.

Seaford similarly relied on Delaware law in concluding its brief in the Delaware Supreme Court (17b):

> DP&L has failed to show that the opinion and judgment below were in error in the law relied upon for the Superior Court's decision, or that it has any compensable right to serve the properties at issue under the law of this state.

In the proceedings below, Seaford clearly was correct to approach the franchise question as a question of Delaware property law.[4] Just as clearly, Seaford is wrong to seek this Court's review of the Delaware Supreme Court's determination of the Delaware property law question.

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4. *See Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330 (9th Cir. 1977) ("In determining what property rights exist and therefore are subject to taking under the Fifth Amendment, federal courts look to local state law"); *Bishop v. Wood,* 426 U.S. 341, 344 (1976) (property interests are created by state law, not by the United States Constitution); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (same); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980) ("as a general proposition . . . the United States, as opposed to the several States, [is not] possessed of residual authority that enables it to define 'property' in the first instance").

Even the authority relied upon most strenuously by Seaford (P 4, 6-7) recognized that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy," not federal constitutional law. *Tennessee Electric Co., supra,* 306 U.S. at 141.

III. THE DELAWARE STATE CONSTITUTION ALSO PROVIDES AN INDEPENDENT STATE GROUND FOR THE RESULT REACHED BELOW

In the proceedings below, Seaford disputed the existence and nature of Delmarva's franchise. It did not dispute the settled law that the Fifth and Fourteenth Amendments together require that a municipality pay just compensation for taking or displacing a state-franchised utility. *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 39-40 (1919).

Even if Seaford had fairly presented federal constitutional arguments to the courts below and the Delaware Supreme Court had somehow misinterpreted the federal constitution, the decision below still would have an adequate state ground in the Delaware Constitution of 1897, which prohibits deprivation of "property, unless . . . by the law of the land" (art. I, § 7), and which further provides that no "man's property [shall] be taken or applied to public use . . . without compensation being made," art. I, § 8. Seaford's contention that the state provisions "are construed to provide the same rights and guarantees" as the federal ones (P 7-8) does not matter. Where the decision of the state supreme court is based upon parallel provisions of the federal and state constitutions, certiorari should be denied on the basis "that the judgment below rests upon an adequate state ground." *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, 429 U.S. 889 (1976) and *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, 170 Conn. 155, 365 A.2d 393, 395, *cert. denied*, 429 U.S. 889 (1976).

Seaford contends that the Delaware Supreme Court "conceived of its ruling" as based upon the federal constitution alone and not as "independently founded on the Delaware constitution" (P 7). That contention is belied by express language of the opinion below (*see, e.g.*, P 27a), and by the very opinion of this Court cited by

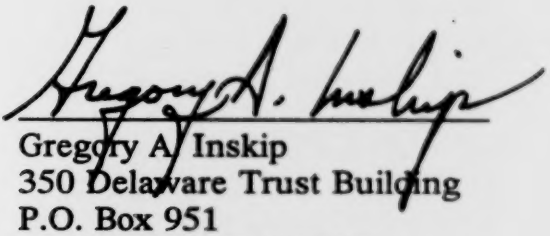
Seaford in support of its contention, *Michigan v. Long*, 463 U.S. 1032 (1983). *Long* indicated that state law might not provide an adequate and independent ground for a decision "when it fairly appears that the state court rested its decision primarily on federal law," 463 U.S. 1042.

Seaford stands *Long* on its head, arguing that because the Delaware Supreme Court distinguished and did *not* follow the *Tennessee Valley Authority* case, it somehow felt "required" to construe the state due process and just compensation clauses consistently with the federal ones (P 7). In fact, at that juncture of its opinion, the court below was not focusing on either the state or the federal constitutional provisions. Rather, the Delaware Supreme Court concluded, after respectful consideration, that the *Tennessee Valley Authority* decision was primarily procedural and factual and not "authority for defining the [Delaware law] property rights of the parties in this case." (P 17a). Those Delaware law property rights on the one hand, and the Delaware Constitution on the other, each provide adequate and independent grounds for the result below, and for the denial of the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the City of Seaford's petition for a writ of certiorari to review the decision of the Supreme Court of the State of Delaware.

Respectfully submitted,



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APPENDIX

I. RULE 24.1(f) LEGAL PROVISIONS

A. 28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

B. United States Constitutional Provisions

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Provisions of the Constitution of the State of Delaware Adopted 1897

Article I, § 7. Procedural rights in criminal prosecutions; jury trial; self-incrimination; deprivation of life, liberty or property.

Section 7. In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, unless by the judgment of his peers or by the law of the land.

Article I, § 8. Prosecution by indictment or information; double jeopardy; just compensation for property.

Section 8. No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same offense twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made.

D. Provisions of the Public Utilities Act of 1974 of the State of Delaware, Title 26 of the Delaware Code

§ 102. Definitions.

As used in this title, unless the context otherwise requires:

(1) "Commission" means the Public Service Commission.

(2) "Public utility" includes every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees, or receivers appointed by any court whatsoever, that now operates or hereafter may operate, within this State, any steam, manufactured gas, natural gas, electric light, heat, power, water, telephone, excluding telephone service provided by cellular technology, or by domestic public land mobile radio service or heating oil (for residential consumption directly to residences by means of a pipeline) service, system, plant or equipment, for public use.

• • •

§ 201. General jurisdiction and powers.

(a) The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

• • •

§ 202. Limitations on jurisdiction of Commission.

(a) The Commission shall have no supervision or regulation over any public utility or over the rates, property, property rights, equipment, facilities, service territories or franchises of any public utility that is municipally owned or any municipal electric company formed pursuant to Chapter 13 of Title 22.

* * *

§ 203A. Certificate of public convenience and necessity; abandonment or discontinuance of business, operations or service.

(a) (1) Subject to the provisions of subsection (b) of this section and §§ 102, 201 and 202 of this title, no individual, copartnership, association, corporation, joint stock company, agency or department of the State, cooperative, or the lessees, trustees or receivers thereof, shall begin the business of a public utility nor shall any public utility begin any extension of its business or operations without having first obtained from the Commission a certificate that the present or future public convenience and necessity requires or will require the operation of such business or extension.

(2) This section shall not be construed to require any public utility to secure such a certificate for any extension within the perimeter of any territory already served by it.

(3) The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity.

* * *

(c) (1) No public utility shall abandon or discontinue, in whole or in part, any business, operations or services provided under a certificate of public convenience and necessity or otherwise which are subject to jurisdiction

of the Commission without first having received Commission approval for such abandonment or discontinuance.

(2) Applications for such approval shall be made to the Commission in writing, verified by oath or affirmation and be in such form and contain such information as the Commission may from time to time require.

(3) The Commission shall approve any such application when it finds that the utility has met its burden of proving that the abandonment or discontinuance is reasonable, necessary and not unduly disruptive to the present or future public convenience and necessity.

(4) The Commission may make such investigation and hold such hearings in the matter as it deems necessary or appropriate, and may attach reasonable terms and conditions to the granting of such approval.

(5) If, within 60 days after the filing of such application, the Commission has not acted concerning the application, it shall be deemed to have been approved. The Commission may, within such 60-day period, set the matter for hearing, in which event the Commission shall render a decision concerning said application within 7 months from the date such application was filed or the application shall be deemed in fact and law to be approved, unless within said 7-month period the Commission for good cause shown shall enter an order extending the period for decision for a further reasonable time not to exceed 120 days.

(6) Nothing contained in this section shall be construed to require formal application for approval of abandonment or discontinuance of service to any individual customer or customer class where the basis for such abandonment or discontinuance is nonpayment of bills or other violation of the utility's rules, regulations and tariffs.

(7) The Commission may seek injunctive relief in the Court of Chancery to prevent any abandonment in violation of this subsection and in such proceeding shall

not be required to post security for any temporary or preliminary injunction. (47 Del. Laws, c. 254, § 8; 48 Del. Laws, c. 371, § 13; 26 Del. C. 1953, § 162; 53 Del. Laws, c. 364, §§ 1-4; 54 Del. Laws, c. 38, § 1; 57 Del. Laws, c. 665, §§ 2, 3; 59 Del. Laws, c. 397, § 1; 64 Del. Laws, c. 150, § 1; 66 Del. Laws, c. 50, § 1.)

§ 204. Extension of utilities' facilities.

The Commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the Commission, such extension is reasonable and practicable and will furnish sufficient revenue to justify the construction and maintenance of the same, and when the financial condition of the public utility reasonably warrants the original expenditures required in order to make and operate such extension; provided, however, the Commission shall consider, among other things, the size and amount of additional and potential customers to be served, whether the new customers will contribute to any capital expenditures required by the extension and whether the public utility must borrow funds to provide the extension of service. (47 Del. Laws, c. 254, § 4; 26 Del. C. 1953, § 136; 59 Del. Laws, c. 397, § 1.)

§ 906. Powers and duties of electric utility corporations; regulation of use of public roads, streets, etc.

(a) Every corporation organized under Chapter 1 of Title 8 for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, in addition to the powers conferred upon corporations generally, may use the public roads, highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures. The consent of the council, town commissioners or other persons having control over the public roads, highways, streets, avenues and alleys of the city, town and district

in or upon which the posts or poles are to be erected shall first, and as a condition precedent, be obtained.

(b) No posts or poles shall be erected in any street of any city or incorporated town except in those streets which are designated by the authorities thereof and then only in such place and manner as is thus designated, and the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the streets, highways and roads. The use of the public streets in any of the cities and incorporated towns of this State shall be subject to such regulations and taxation as may be first imposed by the corporate authorities of such cities and towns.

(c) No posts or poles shall be erected upon the soil or property of any person without first obtaining the consent in writing of the owner of the soil or property.

(d) Any wire crossing a railroad shall not be at a less elevation than 23 feet. (21 Del. Laws, c. 273, § 101; 22 Del. Laws, c. 166, § 17; Code 1915, § 2044; Code 1935, § 2188; 26 Del. C. 1953, § 906.)

§ 907. Laying pipes, conduits or wires by electric utility corporations.

Every corporation mentioned in § 906 of this title may lay pipes, conduits or wires beneath the public roads, highways, streets, avenues and alleys as it deems necessary. The pipes, conduits and wires shall be laid at least 2 feet below the surface of the same and shall not in any way unnecessarily obstruct or interfere with public travel or damage public or private property. No public streets shall be opened for such purpose without the consent of the counsel of any city, or the town commissioners of any incorporated town, or other persons having control over the public roads, highways, streets, avenues and alleys. Such use of the public streets in any of the cities and towns of this State shall be subject to such regulations, taxation and restrictions as may be first imposed by the corporate authorities of such

cities and towns. (21 Del. Laws, c. 273, § 102; 22 Del. Laws, c. 166, § 17; Code 1915, § 2045; Code 1935, § 2189; 26 Del. C. 1953, § 907; 57 Del. Laws, c. 446.)

E. Ordinances of the Levy Court of Sussex County, State of Delaware

Ordinance of July 10, 1900

Be it resolved by the Levy Court of Sussex County at the July Session A.D. 1900, that THE DELAWARE ELECTRIC COMPANY its successors and assigns, be and the same is hereby authorized to use the Streets and Highways of Sussex County for the purposes of erecting poles for carrying wires, and the placing of wires on the same, for transmitting electricity for light, heat and power, or for building and maintaining of subways for the transmitting electricity for light, heat and power.

PROVIDED that all poles placed by the said Company on the Streets or Highways of the said County shall be placed or set on the extreme side limit of the said Streets or Highway and in all cases where the wires of the said Company shall cross the said Streets or Highways they shall be placed at such a distance from the ground as not to interfere with or hinder the public in the use of the said Streets or Highways.

AND PROVIDED FURTHER that all subways built by said Company uponnthe [sic] Streets or Highways of the said County shall be built under and along the extreme side limit of the said Streets or Highways, and in all cases where the wires of said Company cross the said Streets or Highways the said Subways shall be run directly across said Streets or Highways and at such depth that the same shall not interfere with or hinder the public in the use of said Streets or Highways.

July 10, 1900

Ordinance of July 22, 1930

BE IT RESOLVED by the Levy Court of Sussex County, Delaware, that the right, revocable at the pleasure of the Levy Court, to erect and maintain poles and to string wires thereon, be and the same hereby is granted to and vested in Eastern Shore Public Service Company, a corporation of the State of Delaware, its successors and assigns, over and along all roads and highways within the limits of Sussex County over which the said Levy Court of Sussex County has jurisdiction, and provided that all such poles and wires be erected and located on the extreme side of such County Roads so as in nowise to interfere with the free and unimpeded use of said County roads for vehicular or other traffic.

BE IT FURTHER RESOLVED that whenever said Eastern Shore Public Service Company desires or proposes to erect poles and string its wires along any of the County roads under the jurisdiction of the Levy Court of Sussex County, notice of its intention so to erect poles and string wires shall be given to the County Engineer of Sussex County, and all poles so to be erected on and along said County roads shall be erected under the supervision and according to the instructions of the County Engineer of Sussex County.

I, John S. Cooper, Clerk of the Peace in and for the County of Sussex and State of Delaware, and as such Clerk of the Levy Court of Sussex County, hereby certify that attached hereto is a true and correct copy of a franchise granted unto Eastern Shore Public Service Company by said Levy Court of Sussex County on the twenty-second day of July, A.D. 1930.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Levy Court this twenty-second day of July, A.D. 1930.

/s/ John S. Cooper

Clerk of the Peace and
Clerk of the Levy Court of
Sussex County, Delaware

II. EXCERPTS FROM SEAFORD'S MEMORANDUM OF POINTS AND AUTHORITIES, DATED OCTOBER 23, 1987, IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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[p. 68] CONCLUSION

In these consolidated proceedings, Delmarva Power & Light Company seeks compensation in inverse condemnation for the alleged taking by Seaford of Delmarva's alleged franchise rights to supply electricity to certain properties located within the boundaries of the City of Seaford. The factual circumstances underlying these actions are simple, and there are no material facts in dispute. The only issue is the legal issue of whether DP&L has a valid or compensable franchise right to serve the properties in question. By the operation of applicable provisions of the Delaware Constitution and Delaware statutory law, [p. 69] and pursuant to case law precedent established in Delaware courts, it is clear that DP&L has no valid franchise rights whatsoever to serve these properties. Having no exclusive franchise rights, and having claimed no other compensable interest in its Complaints in these proceedings, DP&L makes no claim for which it may be compensated. Pursuant to Rule 56 of the rules of Civil Procedure for the Superior Court of the State of Delaware, and pursuant to recent United States Supreme Court precedent, Seaford has herein demonstrated that DP&L has presented no evidence of a factual dispute, and no evidence that can support its case. Therefore, these actions are appropriate for summary judgment. The weight of legal precedent demonstrates that summary judgment must be entered in favor of defendant City of Seaford in these actions.

PRAYER

WHEREFORE, the City of Seaford hereby respectfully prays that summary judgment be entered in its favor in these proceedings, and against plaintiff Delmarva Power & Light Company, and that these consolidated cases be dismissed with prejudice.

Respectfully submitted,
/s/ James A. Fuqua, Jr.

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Dated: October 23, 1987

III. EXCERPTS FROM ANSWERING BRIEF OF CITY OF SEAFORD, DATED JULY 7, 1989, IN THE SUPREME COURT OF THE STATE OF DELAWARE

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[p. 35] CONCLUSION

DP&L has failed to show that the opinion and judgment below were in error in the law relied upon for the Superior Court's decision, or that it has any compensable right to serve the properties at issue under the law of this state. Therefore, for the reasons stated herein, the order below granting summary judgment against Delmarva must be affirmed.

Respectfully submitted,

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